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No. 76-129

In the Supreme Court of the United States

OCTOBER TERM, 1976

S. SANFORD LEVY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The question presented in this federal income tax case is whether the Court of Claims correctly held that an election filing fee and campaign expenditures incurred by a state court judge seeking reelection were not deductible either under Section 162 of the Internal Revenue Code of 1954, as amended (26 U.S.C.), as ordinary and necessary business expenses, or under Section 212 as ordinary and necessary expenses incurred for the production of income.

The undisputed facts are as follows: In 1966, after having practiced law for 35 years, petitioner for the first time was elected Judge of Division "D" of the Civil District Court for the Parish of Orleans, New Orleans, Louisiana. In 1972, in his successful effort to seek reelection, petitioner paid a $550 qualifying fee to the State Central Committee and paid $14,403.20 as his pro rata share of the costs of sample ballots which were distributed by the

various political organizations supporting his reelection campaign (Pet. App. A 8-9; Pet. 3).

On his 1972 tax return, petitioner claimed as "miscellaneous deductions" the $550 qualification fee and $14,403.20 in campaign costs. On audit, the Commissioner of Internal Revenue disallowed the deductions (Pet. App. A 9). In this refund suit, the Court of Claims upheld the Commissioner's determination (Pet. App. A 8-13).

The Court of Claims correctly held that this case is controlled by *McDonald* v. *Commissioner*, 323 U.S. 57. There, the taxpayer accepted a temporary appointment by the Governor of Pennsylvania to be a judge of the Court of Common Pleas of Luzerne County. Subsequently, the taxpayer stood for election to the judgeship to which he had been appointed. In order to get the support of the political party, he was obligated to pay to the party an amount which he had been assessed. After losing the election, he sought to deduct the assessment as well as his other campaign expenses. In holding that the expense was not deductible as an expense incurred in carrying on a trade or business, the plurality of this Court stated that the disallowance of the deduction of campaign expenses had been consistently reflected by legislative history, court decisions, Treasury Regulations, and Treasury administrative practice.[1]

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[1]Sections 162 and 212 of the Code respectively permit the deduction of ordinary and necessary expenses incurred in carrying on a trade or business or for the production or collection of income. In *McDonald*, the plurality stated that the statutory antecedent of Section 212 did not expand on the types of expenses deductible under the predecessor of Section 162, but merely enlarged the categories of incomes with reference to which expenses were deductible (323 U.S. at 62).

The considerations set forth in *McDonald* for not allowing the deduction are applicable to this case. Both the expenses here and in *McDonald* were incurred in seeking election to public office. As the plurality noted in *McDonald*, the relationship between expenses incurred in securing election to public office and tax deductions involves issues of far-reaching importance which should be addressed by Congress. However, Congress has thus far enacted no provision allowing the type of deduction which petitioner seeks.[2] Instead, Congress has adopted a general policy that the Treasury should remain neutral in this area.[3] *Cammarano* v. *United States*, 358 U.S. 498;

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[2]The courts of appeals have uniformly applied *McDonald* to deny such deductions. *Nichols* v. *Commissioner*, 511 F. 2d 618 (C.A. 5), certiorari denied, 423 U.S. 912; *Maness* v. *United States*, 367 F. 2d 357 (C.A. 5), certiorari denied, 386 U.S. 932; *Campbell* v. *Davenport*, 362 F. 2d 624 (C.A. 5); *Shoyer* v. *United States*, 290 F. 2d 817 (C.A. 3), certiorari denied, 368 U.S. 835; *Carey* v. *Commissioner*, 460 F. 2d 1259 (C.A. 4), certiorari denied, 409 U.S. 990.

Contrary to petitioner's contention (Pet. 4), Rev. Rul. 71-470, 1971-2 Cum. Bull. 121, does not support the deductibility of his reelection expenses. That ruling provides that expenses incurred by an elected public official in order to defend his position against a recall from office are deductible business expenses. However, the ruling expressly notes that *McDonald* bars the deduction of the campaign expenditures of a taxpayer seeking election to public office.

Rev. Rul. 75-120, 1975-1 Cum. Bull. 55 (Pet. 4), is also distinguishable. It merely provides that employment agency fees are deductible business expenses.

[3]See, *e.g.*, Section 162(e)(2) (nondeductibility as business expenses of amounts contributed to political campaigns or efforts to influence legislation); Section 170(c)(2) (denying charitable contribution deductions with respect to gifts to political campaigns or organizations engaged in influencing legislation); Section 271 (providing that a taxpayer may not deduct as bad debts amounts owed to him by a political party); Section 276 (disallowing deductions for certain indirect contributions to political parties); Section 501(c)(3) (denying tax-exempt treatment to any organization which devotes a substantial part of its activities to influencing legislation or participating in

Christian Echoes National Ministry, Inc. v. *United States*, 470 F. 2d 849 (C.A. 10), certiorari denied, 414 U.S. 864. There is accordingly no statutory basis for petitioner's claimed deduction.[4]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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political campaigns); Section 642(a)(3) (26 U.S.C. (Supp. V)) (providing that trusts and estates are not entitled to a tax credit for political contributions); Section 4945(a), (d)(1) and (e) (imposing a tax on the expenditures of a private foundation made for the purpose of influencing legislation).

Sections 41 and 218 (26 U.S.C. (Supp. V)), which allow an alternative income tax credit or deduction for political contributions, are a limited exception to this rule. They limit the credit or deduction to maximum dollar amounts.

[4]Since there is no basis in the Code for the claimed deductions, the Court of Claims also correctly rejected petitioner's alternative contention (Pet. 2, 5) that he should be permitted to amortize the expenses at issue over the term of his judgeship. See *Maness* v. *United States*, *supra*; *Mays* v. *Bowers*, 201 F. 2d 401 (C.A. 4), certiorari denied, 345 U.S. 969.